SUPREME COURT, U. S.

NO. 149

FILED

DEC 29 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

WAYNE DYKE, ED McKINNEY
and JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING
COMPANY, INC.,
Respondent.

On Writ of Certiorari to
The Supreme Court of Tennessee

BRIEF FOR RESPONDENT

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12-28-67-70

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BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The basis of this Court's jurisdiction, as asserted by petitioners, is 28 U.S.C. § 1257(3); however, for the reasons hereinafter set out respondent respectfully submits the Court improvidently granted the writ of certiorari as to Question Three presented in petitioners' brief and, therefore, lacks jurisdiction to consider said Question Three.

QUESTIONS PRESENTED

1. Was the search of the automobile in which petitioners were riding at the time of their arrest and the seizure of a rifle found therein reasonable in view of all the facts developed in the record?

2. Was the issue of whether the Fourteenth Amendment makes the Sixth Amendment's jury trial guarantee obligatory upon the states in criminal contempt cases properly raised in the Supreme Court of Tennessee or actually considered and determined by that court?

3. Does the Fourteenth Amendment make the Sixth Amendment's jury trial guarantee obligatory upon the states in criminal contempt cases?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

***The Constitution of the State of Tennessee*:**

Article 1, Section 6. "That the right of trial by jury shall remain inviolate. . . ."

***Rules of the Supreme Court of Tennessee*:**

Rule 15. *Brief in support of assignments of error.* —The assignments of error must be accompanied by a brief, which shall state concisely and specifically the propositions of law and fact, without argument or elaboration, relied upon by the appellant, or plaintiff in error, to sustain the several errors assigned for reversal of the trial court. There must follow each proposition of law a citation of the authorities relied upon to sustain it, and there shall follow each proposition of fact citations to the record which are relied upon to sustain the contention of the appellant, or plaintiff in error.

(1) *This brief must be filed in all cases.* —It may be combined with the assignments of error, or filed in a separate form. An argument will not supply the place of a brief.

(2) *Case affirmed when assignments of error not filed.* —When appellants, or plaintiffs in error, in civil cases, fail or refuse to file an assignment of errors and brief, as required by this rule, it will be taken as an abandonment of the appeal or writ of error, and the decree or judgment will be affirmed. Errors not assigned and supported by brief according to this rule, will be treated as waived, but the court, in its discretion, may notice an error overlooked by counsel.

Note: The above rule of the Supreme Court of Tennessee is officially noted in Volume 185, Tennessee Reports, page 870, and also in Volume 1, Tennessee Code Annotated, pages 824-825.

STATEMENT OF CASE

In addition to the petitioners' statement of the case, the following facts are pertinent. The sheriff of Monroe County received a call on the night petitioners were arrested concerning a shooting at the home of Lloyd Duckett involving an automobile which was described at the time. A description of the car was then broadcast by the sheriff's office. (J.A. 20). The description which was broadcast over the radio matched the car in which petitioners were later apprehended. (J.A. 22).

Deputy Sheriff Powers of McMinn County heard the alert at about 11:00 P.M. while patrolling and drove toward Englewood, Tennessee, a town in McMinn County but near the Monroe County line. As he approached Englewood he met a car which matched the description which he had

received, and he turned around and chased it at speeds of 70 to 80 miles per hour, but was not able to overtake it so he called the Athens city police who stopped the car in which petitioners were riding. Powers arrived before any of the occupants alighted from the automobile. While talking to the driver Powers observed a fresh bullet hole in the rear of the car in which petitioners had been riding. The driver said it had been there a long time. Before taking petitioners to jail, Powers called the Monroe County sheriff and advised him that he thought he had the right car. (J.A. 26-29). The McMinn County sheriff also observed the bullet hole in petitioners' car and testified that in his opinion it was made that very night. (J.A. 33).

Petitioners were taken to the McMinn County jail about 11:30 P.M. (J.A. 33) where the driver was placed under arrest for reckless driving and then Deputy Powers immediately went back outside the jail and searched petitioners' automobile and found a gun under the front seat. (J.A. 30).

ARGUMENT

I. THE SEARCH OF PETITIONERS' AUTOMOBILE WITHOUT A WARRANT WAS NOT UNCONSTITUTIONAL.

The petitioners contend that error was committed in allowing certain evidence to be introduced concerning a rifle found in the automobile in which petitioners were riding in contravention of their rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

The evidence which petitioners charge was illegally obtained relates solely to the rifle. As will be shown, the search which uncovered this weapon was reasonable and therefore not in violation of the constitutional guaranties against unreasonable searches and seizures. The validity of the search in this case may be sustained either upon the ground that the arresting officers had probable cause for believing that petitioners had committed a felony and the search was incident to the arrest or upon the ground that the automobile was validly held as evidence in the commission of a felony. Cf. *Cooper v. California*, 386 U.S. 58.

A. The Validity of a Search Without a Warrant Depends Upon all of the Facts and Circumstances of the Case and Not Solely Upon the Practicality of Obtaining a Warrant.

Considerable emphasis is placed by petitioners upon the contention that under a proper interpretation of the Fourth Amendment a search without a warrant is reasonable only if the exigencies of the situation make it impracticable to obtain a warrant. To be certain, the birth of this doctrine with respect to searches incident to a lawful arrest occurred in the 1948 case of *Trupiano v. U. S.*,

334 U.S. 699, and was affirmed later in the same year in *McDonald v. U. S.*, 335 U.S. 451. Petitioners rely heavily upon what they label the "*McDonald* rule" perhaps in an attempt to avoid the stigma of the discredited "*Trupiano* rule."

The principle enunciated in *Trupiano* was short-lived. *U. S. v. Rabinowitz*, 339 U.S. 56, specifically overruled *Trupiano* to the extent that it "requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest." 339 U.S. at 66. No subsequent opinion has suggested that *Rabinowitz* has been overruled. Indeed, the 1967 decision in *Cooper v. California*, 386 U.S. 58, cited *Rabinowitz* with approval in upholding a search of an automobile validly held as evidence in a forfeiture proceeding. The search in *Cooper* was not incident to an arrest, for it was made one week after the arrest and seizure of the automobile.

Petitioners in their brief argue that the so-called "*McDonald* rule" would work better than the rule in *Rabinowitz* which requires a review of all pertinent factors in determining whether or not a search is reasonable. To require a search warrant in all instances where there is time to obtain one, would, according to petitioners, be easy to administer and would result in less confusion on the part of law enforcement officials with the result that there would be fewer instances in which guilty men are freed because of an improper search.

Justice Minton in the *Rabinowitz* opinion admitted that "a rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search." 339 U.S. at 65.

Only unreasonable searches and seizures are condemned by the Fourth Amendment. Reasonable searches may be made without a warrant. The Constitution does not define the limits of reasonable warrantless searches, but rather, the framers of the Bill of Rights in their considered wisdom left this for judicial interpretation. Certainly, the drafters knew that many instances would arise concerning whether a particular search without a warrant was reasonable. Was it not within their abilities to suggest a simple rule that all searches would be unreasonable if there was time to procure a warrant? But nothing in the language of the Fourth Amendment supports the contention that a search warrant must always be secured where there is time to obtain it. *Rabinowitz*, *supra*, 339 U.S. at 65:

> "It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches."

B. The Search in the Present Case was Reasonable in View of all the Facts and Circumstances.

Petitioners maintain that the facts of this case "are virtually indistinguishable" from *Preston v. U. S.*, 376 U.S. 364, and that the considerations which led the Court to uphold the search in *Cooper v. California*, 386 U.S. 58 are "totally inapplicable" in the present case. Actually, a perusal of the opinions in *Preston* and *Cooper* and the record in this case reveals the facts and circumstances here to be more similar to those in *Cooper* than those in *Preston*.

1. *Reason for Arrest*:

First, the reasons prompting the arrest in these cases should be considered. The only information the police had in *Preston* was that three suspicious men acting suspiciously had been sitting in a parked car from 10:00 P.M. to 3:00 A.M. Upon receiving this information from a telephone complaint, the police immediately went to the place where the car was parked and accosted the three men and inquired of them their reason for being parked there. When the men gave answers which the officers deemed unsatisfactory, they were arrested for vagrancy. They were searched and then taken to police headquarters. The automobile was not searched at the scene of the arrest, but was driven from there to the police station by an officer and then later taken to a garage. A subsequent warrantless search of the car in the garage disclosed two loaded revolvers in the glove compartment and caps, women's stockings (one with mouth and eye holes), rope, illegally manufactured license plates, and other items in the trunk. Despite timely objection, these articles were introduced into evidence at petitioner's trial, which resulted in his conviction on a charge of conspiracy to rob a federally insured bank. The police in *Preston* at the outset had no reason whatever to suspect the men whom they arrested of being guilty of any serious offense. At most the only information the officers had both at the time the investigation commenced and after confronting the men in the parked car was that they were acting "suspiciously."

Unlike the arresting officers in *Preston*, the police in the present case had probable cause at the time of the arrest to believe that the petitioners had committed a serious offense, i.e., shooting into a house in Monroe County. There is no fixed definition of the term "probable cause" as it is used in justifying an arrest without a warrant. It

is the total information of which an officer is possessed. This information may be based upon what the officer is told as well as what he is able to perceive by his own senses. Probable cause exists where the facts and circumstances within an officer's knowledge, and of which he has reasonable trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Brinegar v. U. S.*, 338 U.S. 160; *Carroll v. U. S.*, 267 U.S. 132.

Howard Kirkpatrick, the sheriff of Monroe County, testified in the present case that on the night of February 25, 1966, he was at the jail when a telephone call came in about a shooting at the home of Lloyd Duckett involving an automobile which was described at that time and pursuant to this his officers' broadcast a description of the involved car on their radio. (J.A. 20). The description put out over the radio, Kirkpatrick testified, matched the description of the car which he later saw at the McMinn County jail (J.A. 22) and which was identified as the car in which the petitioners were apprehended.

Lloyd Powers, a McMinn County deputy sheriff, stated that on the night in question, he was patrolling in a patrol car when he heard a call come in over a two-way radio from the Sheriff of Monroe County that there had been a shooting in a house in Monroe County. Powers recalls from the description which was broadcast that the car involved was a "kinda old make model car." As he drove toward Englewood, Tennessee, a town in McMinn County but near the Monroe County line, in response to this call, Powers met three cars. The first car was "kinda an old model car." Powers turned around then started "back after this car (referring to the first car) to see if this was the car they were looking for." (J.A. 26-28).

At this juncture it is important to note several significant facts concerning the present case. First, the auto-

mobile which Deputy Powers started to chase matched the description of the automobile which he was reliably informed had been involved in a serious offense in Monroe County, i.e., shooting into a dwelling house. Secondly, the automobile was coming from the direction of the crime. Finally, the very reason for the chase was to determine if the car and its occupants were those which the Monroe County authorities were seeking in connection with this offense. These facts distinguished this case from *Preston*, for there the officers had no reason to believe that Preston and his confederates had been involved in any serious offense when they initially sought the men arrested.

After turning around and starting the chase Powers was able to overtake the other two cars, but even though he was running from 70 to 80 miles an hour, the deputy was only able to approach within 400 to 500 feet of petitioners' fleeing automobile—"It was running at a high speed, a high rate of speed." (J.A. 28). Being unable to overtake petitioners' car, Powers radioed into the Athens city police who stopped the speeding car. Powers arrived before the three occupants, whom he identified as the petitioners herein, got out of the car. While talking to the petitioners at the scene of apprehension, the officers discovered important evidence—a bullet hole in the trunk of petitioners' car. Upon inquiry the driver replied that it had been there a long time; however, this was obviously a false statement, for Powers noted that it was a fresh bullet hole—" . . . Wasn't no rust spot or anything on the hole, . . ." (J.A. 29).

The testimony concerning the fresh bullet hole in the rear of petitioners' car is undisputed. Sheriff Calvin Cannon of McMinn County testified as follows:

"I went out and looked at the automobile and checked it and found that a bullet or —had entered into the trunk of the automobile and picked up the fragment of the bullet. It hit the frame after it went through and also a tool box and, of course, there was the fresh lead, real bright——" (J.A. 33).

Upon cross-examination Sheriff Cannon stated that in his opinion the bullet hole had to have been made that night (J.A. 34).

The discovery of the bullet hole was not the result of any unlawful search. Indeed, it is not even a "search" to observe that which is fully disclosed by mere visual observation. *United States v. Lee*, 274 U.S. 559, 563.

After petitioners' car was initially stopped on the highway and the deputy had had an opportunity to observe it closer, he called the Monroe County sheriff and indicated that he had the right car, a description of which had moments before been put out on the radio (J.A. 28).

2. *Time of the Search*:

It was about 11:00 o'clock on the night in question when Deputy Powers heard the alert broadcast on the radio. (J.A. 27). Shortly afterwards petitioners were apprehended and brought to the jail by approximately 11:30 P.M. (J.A. 33). At the jail, petitioner McKinney was placed under arrest for reckless driving and immediately thereafter Powers testified that "we went on back out at that time and searched the car." (J.A. 30). Thus, the search was substantially contemporaneous with the arrest. Certainly, it was considerably closer to the time of the arrest than the search in *Cooper*, which was conducted one week after the arrest.

It is true the Court in *Preston* indicated that, after an accused is under arrest and in custody, a subsequent

search made at another place without a warrant is not incident to the arrest. Viewed in the light of this language, the decision in *Cooper*, can only be explained in one of two ways. First, the time and place requirements incident to an arrest have been expanded or abrogated. The second explanation is that the Court now recognizes the principle that an automobile may be searched without a warrant at any time where it is validly held as evidence in a case. Either of these explanations would apply to the facts and circumstances in this case.

3. *Location of Automobile at Time of Search*:

At the scene where the petitioners' car was initially stopped police told them that they were going to take them (the petitioners) to jail and in fact took them to jail, where McKinney was advised that he was under arrest for reckless driving. Presumably, the car was driven by the police to the jail where it was parked outside and later inspected and identified by witnesses Harris and Ellis (J.A. 12, 16). No question is raised in either the *Preston* or this case of the right of the police to drive the vehicle from the place of apprehension on the highway or street to the jail.

In both *Preston* and *Cooper*, the car when searched was safely stored by the police in a garage. This being true there was no danger that any evidence could be destroyed or that the car would be removed.

> "Nor since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction." *Preston v. U. S.*, *supra*, p. 368.

In the present case, the car at the time of the search was parked outside the jail where any member of the public could come. Unlike in the *Cooper* and *Preston* cases where the vehicle searched was confined to the security of a garage, there was a risk in the present case that objects in the car, or even the car itself, might be removed by other confederates of the defendants, or by curious passers-by, or by those intending to steal an automobile parked in the open or to steal objects therefrom.

The need for the police to immediately search the car under these circumstances and even for their "own protection," as mentioned in *Cooper*, would be greater than where the car had been safely parked in a garage for a week or even for a few minutes.

This Court has often observed that the search of a moveable object, such as an automobile, may not be subject to the same stringent requirements as in the case of a fixed or immovable object, such as a house. *Carroll v. U. S.*, 267 U.S. 132; *Brinegar v. U. S.*, 338 U.S. 160.

4. *Authority for Custody of Car:*

Another important factor in the automobile cases is the authority or lack of authority for having custody of the automobile. In speaking of the *Preston* case, the majority opinion in *Cooper* states:

> "The arresting officers took the petitioners' car to the garage simply because they did not wish to leave it on the street. It was not suggested that they did this other than for Preston's convenience or they had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him."

The automobile was properly held in the present case just as it was in *Cooper*. In *Cooper*, it was subject to being held since it was used in the transportation of narcotics and the state law required the arresting officers to seize the automobile so that it could be held as evidence of the violation of the narcotics law. The significant fact in *Cooper* was that the automobile was validly held by the police as evidence. The fact that the California statute required the automobile to be seized and held as evidence pending a final disposition of the narcotics charge is irrelevant, for a state statute obviously cannot limit the guaranties of the Federal Constitution.

The car in the present case was subject to seizure for two reasons. First, it was the instrumentality for the commission not only of the reckless driving offense, but also for the commission of a felony of which the officers had probable cause to believe the petitioners had committed. The automobile was the means by which petitioners reached the scene of the shooting. It was used in the actual shooting, and it was the means by which they fled thereby avoiding immediate apprehension. Secondly, and more important, the car was properly subject to seizure as evidence. The seizure of petitioners' automobile was justified not only by the bullet hole, but also by the fact that after the car was stopped Powers observed it and realized that it was the same car which had been described on the radio only moments before as being a car from which shots had been fired at a house.

It should be noted that there may formerly have been doubt under the so-called "mere evidence" rule whether law enforcement officials could seize articles of mere evidentiary value for use in state court proceedings; however, this uncertainty has been resolved by the recent

case of *Warden v. Hayden*, 387 U.S. 294. In this case, the Court held that the "mere evidence" rule was not a constitutional doctrine.

While the mere lawful custody of a vehicle may not of itself justify a subsequent warrantless search of the same, the total circumstances surrounding the custody may dispense with the need for a search warrant. *Cooper v. U. S., supra*:

> "While it is true, as the lower court said, that 'the lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' Ibid., *the reason for and nature of custody may constitutionally justify the search.*" (Emphasis supplied)

As the *Cooper* opinion notes, Preston was arrested for vagrancy—the officers had absolutely no reason to suspect Preston or his associates of committing any other offense. As has been pointed out previously, Deputy Powers had probable cause to believe the occupants had committed a serious offense. The charge in the present case was reckless driving, but in reality the reason which induced their apprehension was an honest belief based upon probable cause that they had been guilty of shooting into a house in Monroe County. Police custody of the car in Preston was totally unrelated to the vagrancy charge for which he was arrested. Police custody of the car in the present case was directly related not only to the stated grounds of the arrest, but also to the crime which induced their apprehension. The search only moments after the arrest was incident to the reason petitioners were detained and the reason the automobile was being retained. Petitioners were being held pending a further investigation of the shooting in Monroe County and the car was retained as evidence in the shooting.

5. *Conclusion*:

The search of the automobile in this case was not based solely upon the officers' information from a reliable source that an old model car had been involved in a shooting in Monroe County, but also upon the officers' effort to catch a fleeing automobile which matched the description received on the radio and which was coming from the direction of the crime, upon the observation of the fresh bullet hole, which tended to show that the automobile was recently involved in a shooting episode, and upon the statement by one of the petitioners that the hole had been there for a long time, which fact was obviously contradicted by visual inspection. These facts gave the officers reasonable cause for believing that petitioners had committed the offense in Monroe County and when viewed in light of the circumstances concerning the contemporaneousness of the search to the arrest, the location of the automobile at the time of the search, and the authority by which the police were holding the automobile, the search without a warrant was reasonable under the Fourth Amendment.

II. THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED WITH RESPECT TO THE ISSUE OF PETITIONERS' RIGHT TO A JURY TRIAL FOR THE FEDERAL QUESTIONS WERE NOT RAISED OR CONSIDERED IN THE STATE COURT.

Respondent's in their brief in opposition to the petition for writ of certiorari earnestly contended that the petitioners had not raised the federal questions in the state court upon which review was sought. Nevertheless, the Court saw fit to grant the writ upon the issue of whether under the Fourteenth Amendment a defendant in a state court trial for a criminal contempt is entitled to a jury trial

where the contempt also amounts to a felony or serious offense. Respondent respectfully submits that the writ with respect to the issue of the right to a jury trial was improvidently granted and, accordingly, this issue should not be considered by this Court.

The jurisdiction of the Supreme Court in this case is based upon the third section of 28 U.S.C. § 1257; however, under this statute the Supreme Court's review is limited to the specific federal questions that were either properly raised in the state court or actually considered and determined by it. *Whitney v. California*, 274 U.S. 357, 360; *Dewey v. Des Moines*, 173 U.S. 193, 197-198.

Upon appeal to the Supreme Court of Tennessee the petitioners made the following assignment of error:

> "1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground No. 2 (Tr. 84). The defendants' answer demanded a trial by jury (Tr. 74). The Court noted and denied the demand for jury trial (Tr. 99). The defendants had a right to trial by jury by reason of Title 40, § 2504, Code of Tennessee (1956); Art. 1, § 6, of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States."

A party is not required to use any particular form of words or phrases in framing the federal question presented before the state court. It is only necessary "that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U.S. 63, 67.

In other words, the record must clearly indicate that the party seeking to invoke the jurisdiction of this Court duly sought to rely upon a particular provision of the Constitution or act of Congress. The federal issue upon which a litigant seeks Supreme Court review must have been clearly and positively presented so as to bring it unmistakenly to the attention of the state court; it cannot be left to mere inference. *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655. "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature." *Dewey v. Des Moines, supra*, p. 199.

Clearly, petitioners were relying upon the Tennessee Constitution and state statutes in claiming that the chancellor erred in denying their demand for a jury trial. The Seventh Amendment, cited by petitioners in their first assignments of error in the state court, preserves the right to a jury trial as it existed at common law in certain cases tried in the federal courts and does not apply to trials in state courts. *Walker v. Sauvinet*, 92 U.S. 90. Even if the Seventh Amendment could be construed to be applicable to the states it would in no way be pertinent to the present case, for it deals with the right to a jury trial in a civil case. Petitioners concede this interpretation of the Seventh Amendment in footnote 29 on page 44 of their brief. Petitioners' brief clearly shows that it is the Sixth and not the Seventh Amendment which they seek to apply to this case by virtue of the Fourteenth Amendment.

Nowhere in the assignments of error in the Tennessee Supreme Court was either the Sixth or Fourteenth Amendment mentioned nor did the Court consider to what extent, if any, either of these two amendments afford the right to a jury trial in a state criminal contempt proceeding. The

issue of a right to a jury trial under the Fourteenth Amendment was not adequately raised with any degree of specificity, nor can it fairly be said that the state court passed upon the question. In the course of its opinion the Tennessee Supreme Court states:

> "Likewise, that opinion (referring to a prior Tennessee case) takes into full account the 7th Amendment to the Constitution of the United States. It is completely clear that the result we reach in this case would be the same under Federal jurisdiction." ... Tenn. ..., 410 S.W. 2d 881, 884, (J.A. 44).

Taking the view most favorable to petitioners, the portion of the opinion quoted above merely indicates that the Tennessee Court decided that under the Seventh Amendment to the Federal Constitution, which amendment very clearly does not have any application to this case, there is no right to a jury trial in a criminal contempt case. Petitioners, in their reply brief previously filed before the writ was granted, attached considerable significance to the second sentence of the portion of the opinion quoted above. If this sentence means anything, it is that petitioners' Seventh Amendment claim would not change the result if advanced in a federal court, for again the Seventh Amendment would have no pertinence to a case of this nature even if in the federal courts. Furthermore, a mere prediction by the Tennessee Supreme Court of how the federal courts would determine one federal issue does not mean that another federal question, which is now advanced by petitioners, was considered and determined by the Tennessee Supreme Court. It should also be noted that the fact the state court opinion cited *Cheff v. Schnackenberg*, 384 U.S. 373, does not mean that it passed upon or considered the federal question advanced in this court. See *Osborne v. Clark*, 204 U.S. 565, 567-8.

On page eight of their brief in this court, petitioners maintain they asserted their federal claims at all stages of the state proceedings and specifically cite page 40 of the Joint Appendix. On page 40 of the Joint Appendix petitioners have included a portion of its *brief* filed in the Supreme Court of Tennessee, which portion is entitled "Propositions of Law." The first proposition of law contains a reference to the Sixth and Fourteenth Amendments of the Federal Constitution; however, briefs filed in the state courts cannot be used to establish that a federal question was raised. *Live Oak Assn. v. Railroad Commission*, 269 U.S. 354, 357-358; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54.

The "Propositions of Law" contained in petitioners Tennessee Supreme Court brief were included pursuant to Rule 15 of that Court which provides as follows:

> Rule 15. *Brief in support of assignments of error.*—The assignments of error must be accompanied by a brief, which shall state concisely and specifically the propositions of law and fact, without argument or elaboration, relied upon by the appellant, or plaintiff in error, to sustain the several errors assigned for reversal of the trial court. There must follow each proposition of law a citation of the authorities relied upon to sustain it, and there shall follow each proposition of fact citations to the record which are relied upon to sustain the contention of the appellant, or plaintiff in error.
>
> (1) *This brief must be filed in all cases.*—It may be combined with the assignments of error, or filed in separate form. An argument will not supply the place of a brief.

> (2) *Case affirmed when assignments of error not filed.* —When appellants, or plaintiffs in error, in civil cases, fail or refuse to file an assignment of errors and brief, as required by this rule, it will be taken as an abandonment of the appeal or writ of error, and the decree or judgment will be affirmed. Errors not assigned and supported by brief according to this rule, will be treated as waived, but the court, in its discretion, may notice an error overlooked by counsel.

Clearly, the clause, ". . . which shall state concisely and specifically the propositions of law . . .," refers to the brief which must accompany the assignments of error (which petitioners labeled "Specifications of Error") and not to the assignments of error themselves. Thus, the material appearing on page 40 of the Joint Appendix under "Propositions of Law" is a part of petitioners' brief, and not part of the technical record, and cannot be relied upon to show that a federal question was properly raised in the state court.

If any portion of the brief may be relied upon, then there would be no reason why the entire brief may not be considered in determining whether the issue of a right to a jury trial under the Fourteenth Amendment was adequately presented to the state court. In this regard respondent welcomes a review by the Court of the entire brief filed by petitioners in the Supreme Court of Tennessee. The brief was filed with petitioners' original assignments of error and presumably is filed with the record in this court. In view of petitioners' sole contention that at common law there was a right to a jury trial for indirect contempts, respondent respectfully submits that the only issue before the state court was whether the Tennessee Constitution and statutes afforded a jury trial in such cases.

Even if it could be said that the issue now before the Court was assigned as error in the state court, respondent

submits, it was not in any way supported by brief and would therefore have been treated as waived by the Tennessee Supreme Court under its Rule 15(2), *supra*. The requirement of Rule 15(2) that all assignments of error must be supported by brief or otherwise will be treated as waived is reasonable. The rules of state appellate practice must be followed even with respect to federal rights. *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

In *Beck v. Washington*, 369 U.S. 541, the petitioner maintained that a state statute allowing persons in custody to challenge grand jurors denied equal protection to those persons who were not in custody, but were being investigated by the Grand Jury. Petitioner Beck failed to adequately specify the equal protection contention in his assignments of error before the Washington Supreme Court. Washington case law has developed a rule similar to Rule 15(2) of the Supreme Court of Tennessee. Noting Beck's failure to advance this constitutional argument in the brief before the Supreme Court of Washington, this Court, citing Washington cases, stated:

> "Moreover, the failure of petitioner to argue the constitutional contention in his brief, as opposed to merely setting it forth as he did in one sentence of his 125 page brief, is considered by the Washington Supreme Court to be an abandonment or waiver of such contention." 369 U.S. at 553.

In the present case, the petitioners' brief in the Tennessee Supreme Court consisted of 42 pages and the only reference to the Sixth and Fourteenth Amendments in regard to the right to a jury trial was in the introductory portion of the brief entitled "Propositions of Law" (J.A.40). In the textual portion of the brief relating to the jury trial issue respondent finds absolutely no reference to the Sixth Amendment, the Seventh Amendment or the Fourteenth Amendment or, for that matter, even a vague reference to the United States Constitution.

This Court has consistently refused to entertain jurisdiction of federal questions where reasonable state procedural requirements have not been observed. Even where the highest state tribunal makes no comment on the federal question, the Court has assumed that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U.S. 203, 206-207. Assuming arguendo petitioners properly raised the federal jury issue now advanced, it must further be assumed that their failure to support this contention in their brief was treated by the Tennessee Supreme Court as waived. Under this assumption the failure of the Court to discuss the right to a jury trial under the Sixth and Fourteenth Amendments must have been due to petitioners' procedural deficiency in complying with Rule 15(2).

The sole federal question raised by petitioners' first assignment of error in the Tennessee Supreme Court related to whether or not under the Seventh Amendment petitioners were entitled to a jury trial in a criminal contempt case. Indeed, there was no mention of the Sixteenth Amendment in the first assignment of error. The reference to the Seventh Amendment, however, will not support the issues which, for the first time, petitioners seek to

raise before this Court. In *Chapin v. Fye*, 179 U.S. 127, the Court held that issues raised in the state proceedings under the Fifth Amendment and Seventh Amendment of the Federal Constitution would not support an argument in the Supreme Court based upon the due process clause of the Fourteenth Amendment.

Considering only the questions before it, the Tennessee Supreme Court properly held that under the state constitution and statutes the petitioners were not entitled to a jury trial and that the Seventh Amendment of the United States Constitution does not require a state to grant a jury trial in contempt cases. Since petitioners neither set up in the record the jury issues relating to the Sixth and Fourteenth Amendments which they now raise or in any way alluded to them, it cannot be said that they were "brought to the attention of the state court with fair precision." Nor can it be said that the state court denied the claims now made by petitioners. "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it." *Dewey v. Des Moines*, *supra*, p. 200.

Since the federal jury issues upon which the writ of certiorari was granted were neither raised by petitioners in the state proceedings nor in any way considered or decided by the state court, the Supreme Court lacks jurisdiction to consider them. Accordingly, the writ of certiorari as to the jury trial issue should be dismissed as improvidently granted.

III. PETITIONERS WERE NOT ENTITLED TO A JURY TRIAL.

In considering petitioners claim of a constitutional right to a jury trial in the criminal contempt proceeding in the

state court it is necessary first to ascertain if the Sixth Amendment guaranty of a trial by jury applies to criminal contempt cases in the federal courts where the conduct alleged as contempt amounts to a felony. Respondent argues that it does not, and, if in fact it does not, then obviously petitioners' position would be untenable. If the Court should conclude that the Sixth Amendment does apply to such contempt proceedings in the federal courts, it would be necessary then to determine if the Fourteenth Amendment makes the jury trial guaranty of the Sixth Amendment obligatory upon the states in criminal contempt cases involving felonious conduct.

A. The Sixth Amendment Does Not Create a Right to a Jury Trial in Criminal Contempt Proceedings Involving Conduct Which is a Felony.

Petitioners in the present case were held in contempt of court for disobeying an injunction issued by a chancellor in a state court. Since the acts constituting the contumacious conduct would also amount to a felony under state law, petitioners maintain they were entitled to a jury trial in the contempt proceeding under the Sixth Amendment which, they contend, is made applicable to the states by virtue of the Fourteenth Amendment.

Only until very recently has any serious doubt been raised concerning the constitutionality of the power of courts, both state and federal, to summarily punish for criminal contempt. Thus, as late as 1958 in *Green v. United States*, 356 U.S. 165, the Supreme Court reemphasized the absolute exemption of criminal contempt cases from the requirements of a jury trial afforded under Article 3 and the Sixth Amendment.

> "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from mis-

behavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right. ... The principle that criminal contempts of court are not required to be tried by a jury under Article 3 or the Sixth Amendment is firmly rooted in our traditions." 356 U.S. at 183-184.

Mr. Justice Frankfurter in his concurring opinion in *Green* noted the long judicial acceptance of the power to punish summarily for criminal contempt and succinctly observed:

"... from the foundation of the United States the constitutionality of the power to punish for contempt without the intervention of a jury has not been doubted. ... Nor has the constitutionality of the power been doubted by this Court throughout its existence. In at least two score cases in this court, not to mention the vast mass of decisions in the lower federal courts, the power to punish summarily has been accepted without question. ... To say that everybody on the Court has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated is quite another thing. ... It is not for this Court to fashion a wholly novel constitutional doctrine that would require such participation [of a jury] whatever Congress may think on the matter, and in the teeth of an unbroken legislative and judicial history from the foundation of the Nation." 356 U.S. at 190, 192, 193.

Six years later in *United States v. Barnett*, 376 U.S. 681, the Court was again confronted with the contention that those charged with criminal contempt are entitled to a jury trial under the Constitution. In denying the existence of this constitutional claim the Court stated:

> "This claim has been made and rejected here again and again. ... It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters." 376 U.S. at 692.

By way of footnote dictum the *Barnett* opinion noted that "some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 695.

The *Barnett* dictum was extended in the case of *Cheff v. Schnackenberg*, 384 U.S. 373, where the Court under its supervisory power announced that sentences for criminal contempt in federal courts could not exceed six months imprisonment unless a jury trial is granted or waived.

As petitioners note, much has been written on the subject of summary criminal contempt proceedings. Some scholars have attempted to show that the English authority for summarily punishing indirect contempts without a jury was of dubious validity; however, as the opinion in *Green* observes:

> "[W]hatever the breadth of the historical error said by contemporary scholarship to have been committed by English courts of the late Seventeenth and Eighteenth Centuries in their interpretation of English precedents involving the trials of contempts of court, it at least seems clear that English practice by the early Eighteenth Century comprehended the use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside court." 356 U.S. at 185.

Mr. Justice Harlan concluded, *Id.* at 186:

> "Against this historical background, this Court has never deviated from the view that the constitutional guarantee of trial by jury for 'crimes' and 'criminal prosecutions' was not intended to reach to criminal contempts."

Barnett recognized that some Colonies had enacted statutes restricting the imposition of summary punishment for contempt to only trivial offenses, but the opinion points out that these colonial statutes cannot be regarded as establishing a standard which would permit the summary contempt power to be exercised only with respect to offenses classified as trivial, as the petitioners in the present case would have the Court limit the power. The best answer to the contention that the power to punish summarily for contempt at common law was limited to trivial offenses is, as Mr. Justice Clark in *Barnett* observed, "the Judiciary Act of 1789 which provided that the courts of the United States shall have power to 'punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.'" 376 U.S. at 693. Speaking further of the Judiciary Act of 1789, the Court in *Barnett* says, "it is undisputed that this Act gave federal courts the discretionary power to punish for contempt as that power was known to the common law." 376 U.S. at 687.

Not only is the power to punish summarily for contempt recognized from a historical standpoint, but this Court has noted it is necessary in order for a court to compel obedience to its orders. *In re Debs*, 158 U.S. 564, 594-595:

> "Nor is there ... any invasion of the constitutional right of trial by jury. ... [T]he power of a court to

> make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

Traditionally, criminal contempt proceedings have been described as *sui generis*, i.e., possessing some of the qualities of both civil and criminal wrongs. In *Myers v. United States*, 264 U.S. 95, the Court noted that "while contempt may be an offense against the law and subject to appropriate punishment," since the formation of our government, "proceedings to punish such offenses have been regarded as *sui generis*, and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Id.* at 104-105. Nor have contempt proceedings been deemed to be "crimes" or "infamous crimes" within the meaning of Article 3 or the Fifth Amendment. See *Green v. United States*, *supra*, p. 184-186. While it is true the Court has held many of the procedural safeguards accorded a defendant in a criminal trial applicable to a summary contempt proceeding still both at common law and throughout the history of this Court in interpreting the Sixth Amendment, the summary disposition of contempts has been upheld "*without reference to any distinction based on the seriousness of the offense.*" *United States v. Barnett*, *supra*, p. 694. (Emphasis supplied.)

Since their contumacious conduct also amounts to a felony under state law, petitioners maintain they are entitled to a jury trial in the contempt proceeding because

they would have been entitled to a jury trial if they had been tried in criminal court under an indictment arising out of the same acts. This argument is based upon a misapprehension of the nature of the contempt proceedings. Of course, the violation of the injunction was, as the petitioners contend, also a felony, but it was the violation of the court order for which petitioners were summarily tried and not the criminal act of firing a missile into another's house. If guilty, the punishment could only be that allowed for contempt and not that imposed for a felony. The possibility of another proceeding does not of itself afford the right to a jury trial. For example, if a man drives an automobile negligently and kills another, he may be guilty of manslaughter, and if he is so charged, he is entitled to all the protections of the criminal law. On the other hand, if he is in fact charged before a magistrate with speeding or running a "stop" sign, he cannot be heard to complain that he is entitled to a jury trial simply because he could be tried for manslaughter upon the identical facts.

Petitioners rely upon both *Callan v. Wilson*, 127 U.S. 540 and *District of Columbia v. Colts*, 282 U.S. 63, to support their contention that a jury trial must be afforded in criminal contempt proceedings where the nature of the offense alleged as contempt also constitutes a serious offense under state or federal law. In both *Callan* and *Colts* the defendant was charged with a *crime* as such; neither involved a contempt. In the present case petitioners were tried for violating a court order, but in *Callan* and *Colts* the defendants were tried for a specific violation of the criminal laws. The Court in *Callan* noted that there was a class of offenses tried at common law without a jury, but concluded that conspiracy, the offense for which the defendant was charged, was not among them. 127 U.S. at 555.

Just as the reason for the "nature of the offense" test developed in *Callan* and *Colts* is based upon history, so too the reason for denying jury trials in criminal contempt proceedings emanates from historical roots. At common law the power to punish summarily for contempts—both direct and indirect—was well established. See *Green v. United States*, *supra*, p. 185. But petitioners now ask this Court to ignore this portion of the common law as if it never existed and "to say that everybody on the Court has been wrong for 150 years." *Id.* at 193 (Frankfurter, J., concurring). As Mr. Justice Clark observed in the appendix to his opinion for the majority in *United States v. Barnett*, *supra*, p. 701: "... we find no basis for a determination that, at the time the Constitution was adopted, contempt was generally regarded as not extending to cases of serious misconduct."

Finally, it should be noted that some members of the Court have observed that the penalties for contempt at the time the constitution was adopted were relatively minor, and, therefore, this historical background would not justify the relatively recent practice of imposing lengthy imprisonments in contempt cases without a trial by jury. See *United States v. Barnett*, *supra*, p. 740 (Goldberg, J., dissenting), and *Cheff v. Schnackenberg*, *supra*, pp. 384-385 (Douglas, J., dissenting). To the extent that this argument is valid in requiring jury trials in those contempt cases in which serious punishment may be imposed, it would have no application at all to the facts in this case, for Tennessee has long limited the power of its courts to punish for contempt to a fine of $50.00 and/or imprisonment not exceeding ten days. See Tennessee Code Annotated, § 23-903.

Accordingly, it does not appear that the Sixth Amendment prohibits the federal courts, and *a fortiori* the state

courts, from exercising summary power in criminal contempt cases even where the alleged contempt amounts to a felony or is otherwise a serious offense.

B. The Fourteenth Amendment Does Not Make the Sixth Amendment's Jury Trial Guarantee Obligatory Upon the States.

The Supreme Court has consistently held that the Fourteenth Amendment does not require the states to afford a jury trial in criminal cases. Indeed, no provision of the Federal Constitution expressly guarantees the right to a jury trial in any case, criminal or civil, triable in the state courts. Furthermore, "the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This Court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.' (citation omitted)." *Fay v. New York*, 332 U.S. 261, 288. See also *Irvin v. Dowd*, 366 U.S. 717, 721.

It is true that this Court in several recent and very significant decisions has held some of the guaranties of the Sixth Amendment obligatory upon the states by virtue of the Fourteenth Amendment. In *Gideon v. Wainwright*, 372 U.S. 335, the right to assistance of counsel for an accused in a criminal prosecution was held applicable to the states. Similary, *Pointer v. Texas*, 380 U.S. 400, applied the Sixth Amendment's right of an accused to be confronted with the witnesses against him to the states by virtue of the Fourteenth Amendment. Thus, as stated in *Pointer* "it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Id.* at 406.

Respondent does not maintain, and certainly the language in *Fay v. New York*, *supra*, does not suggest, that none of the guaranties of the Sixth Amendment apply to the states. But respondent does submit that even if the Court should construe the Sixth Amendment as requiring federal courts to grant a trial by jury in all criminal contempt proceedings where the alleged contumacious conduct constitutes a felony, the Fourteenth Amendment would not necessarily require the application of such a holding to the states.

In *Gideon* and *Pointer*, as well as other cases imposing portions of the Sixth Amendment's guaranties upon the states, the Court stressed the fact that the rights which were being applied to the states were "fundamental and essential to a fair trial." *Gideon*, *supra*, p. 342. See also *Pointer*, *supra*, p. 405. The issue then becomes whether the right to a trial by jury is a fundamental right which is essential to a fair trial. To say that trial by jury is a fundamental right in criminal contempt cases, is not only to ignore the historical conclusions to the contrary and to hold that this Court has been wrong for over 150 years as have most state courts, but it is also to conclude that state judges are incapable of summarily trying criminal contempt cases fairly. Respondent cannot adopt this conclusion, and, accordingly, respectfully submits that the Fourteenth Amendment does not require the Sixth Amendment's guarantee of jury trials to be imposed upon the states in any criminal contempt proceedings.

Assuming arguendo that the Sixth Amendment does apply to the states in cases of this nature, respondent insists that in view of the very severe limitation upon the extent of punishment which a Tennessee court can decree for contempt, the present case must be regarded as equivalent to a prosecution of a petty offense. Obviously, the

Tennessee legislature deems contempt as in the nature of a petty offense, for only a minor penalty may be imposed upon one guilty of a contempt. To hold that a state court cannot inflict a ten-day prison sentence for contempt without offering a jury trial, but that a federal court can impose a ninety-day imprisonment without a trial by jury is somewhat anomalous, especially when it is remembered that the Sixth Amendment's jury guarantee specifically applies to the federal courts, but only questionably applies to the state courts.

CONCLUSION

For the foregoing reasons, respondent submits that the decision of the Supreme Court of Tennessee should in all aspects be affirmed.

Respectfully submitted,

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December 28, 1967

AFFIDAVIT OF SERVICE

I, S. Randolph Ayres, of counsel for the Respondent, being first duly sworn according to law, depose and say:

Pursuant to Rule 33, Paragraph 3(c), of the Supreme Court of the United States, I have this ..... day of December, 1967, served a true and exact copy of the foregoing Brief for Respondent upon Bernard Kleiman, 10 South LaSalle Street, Chicago, Illinois, Elliot Bredhoff, Michael Gottesman, and George H. Cohen, 1001 Connecticut Avenue, N.W., Washington, D. C., and George Longshore, Cooper, Mitch & Crawford, 1025 Bank of Savings Building, Birmingham, Alabama, by depositing same in the United States Post Office or mail box, with first class air mail postage prepaid, addressed to said counsel at their respective addresses, and upon Tom J. Taylor, Athens, Tennessee, by depositing same in the United States Post Office or mail box, with first class postage prepaid, addressed to his Post Office address.

.....

S. RANDOLPH AYRES

Sworn to and subscribed before me
this ..... day of December, 1967.

.....

Notary Public

My Commission Expires: .....